FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 14 1945
CHARLES ELMORE CROPLEY
CLERK

No. 971

In the Supreme Court of the United States

OCTOBER TERM, 1944

MAY DEPARTMENT STORES, DOING BUSINESS AS FAMOUS-BARR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
Argument	11
Conclusion	23
Appendix	24

CITATIONS

Cases:

Brandeis & Sons, J. L., Matter of, 47 N. L. R. B. 614, enforced 142 F. 2d 977, certiorari denied October 16, 1944, No. 385, this Term 21, 22

Butler Bros. v. *National Labor Relations Board*, 134 F. (2d) 981, certiorari denied, 320 U. S. 789 16

Crescent Dress Co., Matter of, 29 N. L. R. B. 351 21

Eves and Andresen, Matter of, 42 N. L. R. B. 1209 21

Foster-Grant Co., Matter of, 32 N. L. R. B. 486 21

Gardner-Richardson Co., Matter of, 52 N. L. R. B. 1260 19

Gulf Oil Corp., Matter of, 4 N. L. R. B. 133 6

Hudson Co., J. L., Matter of, 36 N. L. R. B. No. 80 21

Hudson Co., J. L., Matter of, 49 N. L. R. B. 273 21

Knaust Brothers, Matter of, 36 N. L. R. B. 915 21

May Department Stores, Matter of, 46 N. L. R. B. 305 20

May Department Stores, Matter of, 39 N. L. R. B. 471 ..... 21, 22

Medo Photo Supply Corp. v. *National Labor Relations Board*, 321 U. S. 678 ..... 12, 14

Meier & Frank Co., Inc., Matter of, 55 N. L. R. B. 101 21

National Labor Relations Board v. *Algoma Net Co.*, 124 F. (2d) 730, certiorari denied, 316 U. S. 706 16

National Labor Relations Board v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282 16

National Labor Relations Board v. *Botany Worsted Mills*, 133 F. (2d) 376, certiorari denied, 319 U. S. 751 ..... 19, 20

National Labor Relations Board v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685 16

National Labor Relations Board v. *Express Publishing Co.*, 312 U. S. 426 15

634916—45——1

Cases—Continued.

	Page
National Labor Relations Board v. *Hearst Publications*, 322 U. S. 111	6, 19
National Labor Relations Board v. *Kaplan*, 138 F. (2d) 884, certiorari denied, 321 U. S. 788	16
National Labor Relations Board v. *Lebanon News Publishing Co.*, 129 F. (2d) 325, enforcing 37 N. L. R. B. 649	18
National Labor Relations Board v. *Lettie Lee, Inc.*, 140 F. (2d) 243	19
National Labor Relations Board v. *Mason Mfg. Co.*, 126 F. (2d) 810	13
National Labor Relations Board v. *Montgomery Ward & Co.*, 133 F. (2d) 676	18
National Labor Relations Board v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105	16
National Labor Relations Board v. *Newark Morning Ledger Co.*, 120 F. (2d) 262	18
National Labor Relations Board v. *Sunbeam Electric Mfg. Co.*, 133 F. (2d) 856	17
Owens-Illinois Glass Co. v. *National Labor Relations Board*, 123 F. (2d) 670, certiorari denied, 316 U. S. 662	18
Pacific Gas & Electric Co., Matter of, 44 N. L. R. B. 665	19
R. C. A. Communications, Inc., Matter of, 2 N. L. R. B. 1109	6
Richmond Greyhound Lines, Inc., Matter of, 52 N. L. R. B. 1532	19
Schweitzer, Inc., Peter J. v. *National Labor Relations Board*, 144 F. (2d) 520	12
Singer Mfg. Co. v. *National Labor Relations Board*, 24 N. L. R. B. 444, enforced 119 F. (2d) 131	16
Standard Overall Co., Matter of, 53 N. L. R. B. 980	21
Swift & Co., Matter of, 42 N. L. R. B. 1184	19
Wilson & Co. v. *National Labor Relations Board*, 126 F. (2d) 114, certiorari denied, 316 U. S. 690	16

Statutes:

	Page
National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., sec. 151 *et seq.*):	
Section 7	24
Section 8:	
(1)	24
(5)	24
Section 9:	
(a)	24
(b)	22, 25
(c)	25
(d)	25
Section 10:	
(a)	26
(c)	26
(e)	27

Miscellaneous: Page

National Labor Relations Board:
Third Annual Report (Gov't Print. Off., 1939) pp. 157–158 ..... 6, 19
Fourth Annual Report (Gov't Print. Off., 1940) pp. 83–84 ..... 6, 19
Sixth Annual Report (Gov't Print. Off., 1942) p. 63 ..... 6, 7, 19
Eighth Annual Report (Gov't Print. Off., 1944) p. 44 7
National War Labor Board, *Jurisdiction and Procedure of Regional War Labor Boards* 13
Seidman, J., The Needle Trades (New York, 1941) pp. 70–84 22
Zaretz, C. E., The Amalgamated Clothing Workers of America (New York, 1924) pp. 54–68 22

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 971

MAY DEPARTMENT STORES, DOING BUSINESS AS FAMOUS-BARR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 4, 7–18)[1] is reported in 146 F. (2d) 66. The findings of fact, conclusions of law, and order of the National

[1] In referring to the record the same method is used as that followed in the petition for certiorari, except that page references within a particular volume are not bracketed (Pet. 2). References to Volume 1, containing the pleadings, the Board's determination in the representation case, and its decision and order in the complaint case together with the petition to enforce and answer in the court below, are designated "(R. 1, —)." References to Volume 2, printed by peti-

Labor Relations Board (R. 1, 52–64) are reported in 53 N. L. R. B. 1366. The decision and direction of election in a prior representation case which forms part of the record in this case (R. 1, 9–15) is reported in 50 N. L. R. B. 669. The certification of representatives issued by the Board following the election (R. 1, 28–29) is unreported.

JURISDICTION

The decree of the court below (R. 4, 33–35) was entered on January 11, 1945. The petition for a writ of certiorari was filed on February 21, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether it is an unfair labor practice under Section 8 (1) of the Act for an employer, without notifying or affording the certified exclusive bargaining representative of the employees in an appropriate unit an opportunity to negotiate, uni-

---

tioner as an appendix to its brief in the court below, are designated "(R. 2, —)." References to Volume 3, printed by the Board as an appendix to its brief in the court below, are designated "(R. 3, —)." References to the volume containing the opinion of the court below, petitioner's petition for rehearing, the order of the court below modifying the Board's order, the decree, petitioner's motion for a stay and the order staying the issuance of a certified copy of such decree, are designated "(R. 4, —)."

laterally to take action respecting wage increases for such employees.

2. Whether the cease and desist provisions of the Board's order which were sustained by the court below are proper in view of the Board's findings.

3. Whether the Board could properly find that the employees in petitioner's bushelling rooms constitute a unit appropriate for collective bargaining within the meaning of Section 9 (b) of the Act.

4. Whether the Board could properly certify as exclusive bargaining representative of employees in an appropriate unit a labor organization which received a majority of the votes cast in a Board-conducted election where the Board decided that the holding of an election was warranted by the petitioning union's showing that a substantial number of employees in the unit had authorized its affiliate to represent them for purposes of collective bargaining.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the appendix, pp. 21–28.

STATEMENT

Pursuant to a petition filed by St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, affiliated with the Congress of Industrial Organizations, herein

called the Union (R. 1, 3–5), the Board conducted a hearing and on June 16, 1943, issued its Decision and Direction of Election in which it found that all of petitioner's employees "working in the busheling room, second floor, Department 280, and in the busheling room, basement, Department 281, including regular extra employees but excluding the two foremen and all other employees of the Company, constitute a unit appropriate for the purposes of collective bargaining" (R. 1, 14). The evidence in support of this finding (R. 1, 12–13) may be summarized as follows:

Petitioner owns a retail department store in St. Louis, Missouri. In the departments of its store numbered 280 and 281, variously called busheling rooms, alteration rooms, or tailor shops (R. 2, 5–6), alterations and repairs are made on men's and boy's suits, overcoats, trousers, and sportswear sold to customers (R. 2, 2, 51). In department 280, located on the second floor balcony in a segregated space (R. 2, 2–4), approximately 27 busheling employees are regularly employed mending and altering clothes sold to customers on the same floor (R. 3, 8–9; R. 2, 51–52). In department 281, located in the basement, three regular employees (R. 3, 9; R. 2, 40) are engaged in mending and altering clothing sold in the basement (R. 2, 5–6, 42–43). Such employees have special hours of work which differ in starting time and length of lunch period from those of the salespeople, clerks, wrappers, and cashiers (R. 2,

4–5). Bushelmen are classified according to their functions, as fitters, markers, tailors or tailoresses, finishers, pressers, operators, examiners, and rippers (R. 3, 15; R. 2, 41). Except for the fitters, who mark the clothes for alteration on the customers, the bushelmen apparently have no contact with petitioner's customers or sales employees (R. 2, 2–4, 46, 48–49, 51–52; R. 3, 8). Bushelling is regarded as skilled work and as a trade (R. 3, 14–15; R. 2, 44–45, 48, 57).

For about 10 years, between 1910 and 1920, the bushelmen of all department and retail clothing stores in St. Louis, including petitioner's store, were organized and were represented by a local of the Journeymen Tailors Union (R. 3, 10–13, 17, 21; R. 2, 36–37, 69) which had a contract with an employers' association of which petitioner was a member (R. 3, 13–14, 17; R. 2, 69). While the bushelmen had not been represented by any union between 1920 and 1942 (R. 2, 2, 6; R. 3, 2),[2] the organization of bushelmen on a craft basis is common in the clothing industry (R. 3, 12–15). The bushelmen were fully organized, had expressed a desire to be represented in a separate unit (R. 2, 13–15), and no labor organization claimed to rep-

[2] There was evidence that the bushelmen had, in 1941 and 1942, while they were not represented by any union, collectively asked for and received raises in pay (R. 3, 3–4, 7–8; R. 2, 12–13). As a result of their requests, about 75 percent received a raise in 1941 and all received a raise in 1942 (R. 2, 74–75, 79).

resent petitioner's employees on a more comprehensive scale (R. 1, 13).

On the basis of the foregoing facts, the Board rejected petitioner's contention that a store-wide unit would alone be appropriate and, applying its "extent of organization" theory,[3] concluded that "collective bargaining should be made an immediate possibility for the employees in the busheling rooms without requiring them to await the uncertain date when the employees may be organized in a larger unit." (R. 1, 13.)

The Board also rejected petitioner's contention that a unit of employees in the busheling rooms would be inappropriate unless it included the employees in the women's alteration department and in the fur work room (R. 1, 13). The Board pointed out that "there is historically a sharp demarcation between the trades involved," and that not only were the women's clothing alteration workers located in a different part of the store from the men's (R. 2, 3, 55) but that there was no substantial interchange of employees from one to the other (R. 2, 7–10, 80–81, 83).[4]

---

[3] See National Labor Relations Board, *Third Annual Report* (Govt. Print. Off., 1939), pp. 157–158; *Fourth Annual Report* (Govt. Print. Off., 1940), pp. 83–84; *Sixth Annual Report* (Gov't Print. Off., 1942), p. 63; *Matter of R. C. A. Communications, Inc.*, 2 N. L. R. B. 1109, 1115; *Matter of Gulf Oil Corp.*, 4 N. L. R. B. 133, 137; *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 132–135.

[4] Such few transfers as did occur were either permanent (R. 2, 80) or were intended to reduce the size of the busheling force (R. 2, 73).

In accord with the Board's usual practice of proceeding with an investigation of a question concerning representation only where a substantial number of the employees in the appropriate unit have shown an interest in being represented by the labor organization involved,[5] there was introduced at the hearing a report of the Board's Regional Director (R. 2, 85–87) which recited that the Union had submitted authorization cards signed by a large number of employees in the unit.[6] On the basis of this report the Board concluded that the holding of an election was warranted (R. 1, 11), and directed that an election be conducted to determine whether the employees in the unit desired to be represented by the Union, or by the American Federation of Labor, or by neither (R. 1, 15).[7] The election was held on June 29, 1943, and 36 votes were cast for the Union and one

[5] See National Labor Relations Board, *Eighth Annual Report* (Gov't Print. Off., 1944), p. 44; *Sixth Annual Report* (Gov't Print. Off., 1942), p. 55.

[6] The authorizations ran to the United Department Store Employees Union, affiliated with the United, Retail, Wholesale and Department Store Employees of America, C. I. O. (R. 1, 86), which is one of the locals affiliated with the Union (R. 2, 37–38). The Union, as the Board found, represents its local affiliates in collective bargaining (R. 1, 11; R. 3, 6).

[7] The Board directed that the name of the American Federation of Labor appear on the ballot despite the fact that that organization presented no evidence that it had been authorized to represent any employees in the unit involved (R. 1, 14–15). The A. F. of L. was subsequently permitted to withdraw and its name did not appear on the ballot (R. 1, 26).

against (R. 1, 28). The Board accordingly certified the Union as the exclusive bargaining representative of all the employees in the unit (R. 1, 28–29).

Thereafter, on December 17, 1943, upon the usual proceedings, the Board issued its decision and order finding that subsequent to the certification petitioner had refused to bargain with the Union in violation of Section 8 (5) of the Act and that by other conduct petitioner had violated Section 8 (1) of the Act (R. 1, 52–64). The evidence in support of these findings may be summarized as follows:

On July 8, 1943, the Union requested petitioner to bargain concerning wages, hours and working conditions for the employees in the appropriate unit (R. 2, 186). Petitioner, on July 19, 1943, rejected this request assertedly because the unit was not appropriate for collective bargaining (R. 2, 186–187).

On August 31, 1943, without consulting the Union, petitioner made application to the National War Labor Board for approval of voluntary wage and salary adjustments which would increase the wages of all its employees, including those represented by the Union as exclusive bargaining agent, effective retroactively to August 2, 1943 (R. 2, 189–192). A form submitted with the application required the applicant to list the groups of employees whose wages had been nego-

tiated or were then the subject of negotiation with labor organizations and the names of such organizations (R. 2, 193). Petitioner listed the electricians, carpenters, painters, and plasterers and their collective bargaining representatives but not the bushelmen and the Union (R. 2, 193). In a letter accompanying the application,[3] petitioner stated (R. 2, 188):

> The application which covers the employees at the store shows that we have Union contracts and working agreements which cover certain craftsmen, including electricians, painters, carpenters, and plasterers. These employees, being covered by collective bargaining agreements, are excluded from this application.

Petitioner further stated that the Union represented the employees in the busheling rooms and had been certified by the Board, but that the applicant viewed the unit as inappropriate and intended to disregard the Board's certification and to test its position in the court. It stated that it had neither recognized nor bargained with the Union and intended to include the busheling employees in it application. Finally, it stated that it did not believe that the Union had "any interest whatever in the enclosed application" but that, in the event that the Union should object to the inclusion of the busheling

[3] Two applications were submitted covering different groups of employees (R. 2, 187–188).

employees, the application should be considered amended so as to include them.

Thereafter, on September 1, 1943, petitioner's superintendent of employment announced to the employees the filing of this unilateral application over a public address system in the store (R. 2, 178–179, 201–202), and a further announcement to the same effect appeared in petitioner's store newspaper on September 3, 1943 (R. 2, 203). On the same day, September 3, the Union filed a charge that petitioner on July 19, 1943, had refused to bargain and had thereafter taken the unilateral action described above (R. 1, 30). Subsequently, on September 11, 1943, petitioner's vice-president made a speech to the employees over its public address system in which he stated that he had no news as to the status of the application and that he "sincerely hope[d] that nothing will occur which will delay or obstruct or prevent this approval" (R. 2, 182).

The Board found[*] (R. 1, 58–59) that petitioner, on July 19, 1943, and thereafter, had refused to bargain collectively with the Union in violation of Section 8 (5). The Board further found (R. 1, 60) that petitioner's action "in ignoring the Union while attempting to win approval of its proposal for wage increases, and in publishing the facts of its unilateral action to its

[*] The Board adopted, without restating them, the findings and conclusion of the Trial Examiner who conducted the hearing (R. 1, 52–53).

employees, including employees represented by the Union, had the effect of depriving the Union of credit which normally would accrue to it, and of nullifying its efficacy as a bargaining agent. The said action may, therefore, reasonably be said to have undermined the Union among employees for whom it had been certified as bargaining representative, and to have discouraged employees generally in their union affiliation." The Board concluded that by this course of conduct petitioner had violated Section 8 (1) of the Act (R. 1, 61, 62). It ordered petitioner; *inter alia,* to cease and desist from refusing to bargain with the Union and from in any manner interfering with, restraining, or coercing its employees in the exercise of their rights as guaranteed in Section 7 of the Act (R. 1, 53–54).

On March 14, 1944, the Board filed in the court below a petition to enforce the Board's order (R. 1, 64–67). On December 20, 1944, the court entered its opinion (R. 4, 7–15) and on January 11, 1945, its decree enforcing the Board's order with a modification not here material (R. 4, 33–35).

ARGUMENT

1. Petitioner's contention that the Board erred in finding that petitioner had violated Section 8 (1) of the Act by disregarding the certified representative of its employees and taking unilateral action affecting their wages (Br. 25–30, 19–20) is based upon a misconception of the holding in

Medo Photo Supply Corp. v. *National Labor Relations Board*, 321 U. S. 678. Petitioner asserts (Br. 27) that the Court there held the unilateral grant of a wage increase without reference to the employees' exclusive bargaining representative to be an unfair labor practice "only because" the increase "was granted in response to an offer of the employees, to induce them to leave the Union." The opinion, on its face, refutes this interpretation. The Court explicitly held that "negotiations by [the employer] for wage increases with any one other than the union, the designated representative of the employees, was an unfair labor practice" (321 U. S. 678, 683), and that "Such conduct is * * * an interference with the rights guaranteed by § 7 and a violation of § 8 (1) of the Act" (*id.*, at 684). The Board's finding of an unfair labor practice "in [the employer's] direct negotiations with its employees when they had not revoked their designation of the union," was sustained "quite apart" from the Board's additional finding "that it was likewise an unfair labor practice for petitioner, in response to the offer of its employees, to induce them by the grant of wage increases, to leave the union" (*id.*, at 685).[10]

[10] *Peter J. Schweitzer, Inc.* v. *National Labor Relations Board*, 144 F. 2d 520 (App. D. C.), with which petitioner claims a conflict (Pet. 11, Br. 27, 30), is clearly distinguishable. In that case the employer granted a wage increase at a time when the employees had not selected any labor organi-

Petitioner here was not faced with the dilemma of excluding the employees in the unit from its application and risking unfair labor practice charges, or withholding its application altogether and denying wage increases to all of its employees. It could have bargained with the Union as it had with the electricians and other craft groups (*supra*, p. 9), and as the statute requires, or filed a joint application for a wage increase with the Union.[11] Petitioner chose in-

---

zation to represent them in collective bargaining. While questions of the employer's motive in granting an increase, or even, conceivably, the conditional character of an increase, might be relevant in determining in such circumstances whether an increase was offered to induce employees to refrain from selecting an exclusive bargaining representative, those questions are irrelevant where the unilateral increase is granted after an exclusive bargaining representative has been selected.

[11] In its regulations entitled, "Jurisdiction and Procedure of Regional War Labor Boards," the National War Labor Board makes provision (Section VI, B, 2) for joint application for wage adjustments arrived at through collective bargaining. Section VI, B, 3, of the regulations covers the instant situation (where an employer applies on his own initiative for a wage adjustment) and clearly recognizes the interest of the collective bargaining representative in such application. Thus, this section provides that such application: " * * * shall be signed either (i) jointly by the employer and a duly recognized collective bargaining agent for any or all of the employees who are to be affected by the proposed wage or salary adjustment, or (ii) by the employer alone. In either case the application shall state whether or not there is a duly recognized collective bargaining agent (for any or all of the affected employees) which has not joined with the employer in the application. If it appears that there is such an organization which has not so joined,

stead to ignore its statutory duty. Indeed, as the Board found (R. 1, 60), the petitioner's action placed the Union in a genuine dilemma: the Union was compelled either to stand by and take the risk of losing is membership by acquiescing in wage increases concerning which petitioner had refused to bargain, or to request the War Labor Board not to consider petitioner's application for a wage increase insofar as it affected the bushelmen. To force an organization to such a step is almost to compel its self-destruction as an effective collective bargaining representative. Employer conduct which imposes such alternatives upon a statutory bargaining agent would seem to constitute a clear interference with employee self-organization. Cf. *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 686–687.

---

the Wage and Hour Office at which the application was filed shall, before acting on the application, send the appropriate local officials of such organization a notice of the application, requesting the organization, if it has any objections to the application being acted upon, so to inform the office. If no such objections are filed within seven days of the sending of the notice, or if the organization in question states that it has no objections, the application will then be acted upon. * * * As used in this document, the term 'duly recognized collective bargaining agent' refers either to a labor organization which has actually been recognized by the employer for the purpose of collective bargaining or to a labor organization which has been certified by the National Labor Relations Board or a similar State agency where the legal result of such certification is that the employer is obligated to bargain with the union."

2. Petitioner also contends (Br. 17–25) that the provision of the order which restrains it from in any manner infringing the rights guaranteed to employees under Section 7 of the Act is invalid under the principles enunciated in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426. But this argument is apparently based upon the erroneous assumption that the Board could not properly find that the petitioner's unilateral action with respect to the wage increase was a direct violation of Section 8 (1) of the Act (*supra*, pp. 11–14). The Court's refusal in the *Express Publishing* case to uphold a broad cease and desist order was predicated upon the fact that the unfair labor practice there was confined exclusively to a refusal to negotiate with the Union in good faith, a violation of Section 8 (5) of the Act. And while the Court recognized that a violation of Section 8 (5) also technically constituted a violation of Section 8 (1), it distinguished such a violation from the case where the Board found unfair practices which constituted separate and independent violations of Section 8 (1). The opinion makes it clear that the Board may enjoin violations of any section of the Act which it has properly found to have been directly infringed (312 U. S. 426, 434–435). Subsequent to its decision in that case this Court has enforced provisions identical with the one here involved. *National Labor Relations Board* v. *Automotive Main-*

tenance Machinery Co., 315 U. S. 282; *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685; and *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105. Contentions similar to that of the petitioner here were unsuccessfully presented to this Court in *Owens-Illinois Glass Co.* v. *National Labor Relations Board*, 123 F. (2d) 670 (C. C. A. 6), certiorari denied, 316 U. S. 662; *Wilson & Co.* v. *National Labor Relations Board*, 126 F. (2d) 114 (C. C. A. 7), certiorari denied, 316 U. S. 699; *National Labor Relations Board* v. *Algoma Net Co.*, 124 F. (2d) 730 (C. C. A. 7), certiorari denied, 316 U. S. 706; and *Butler Bros.* v. *National Labor Relations Board*, 134 F. (2d) 981 (C. C. A. 7), certiorari denied, 320 U. S. 789; *National Labor Relations Board* v. *Kaplan*, 138 F. (2d) 884 (C. C. A. 2), certiorari denied, 321 U. S. 788.

There is no conflict among the various circuit courts of appeals as to enforcing such provisions when, as in the instant case, the Board has found an independent violation of Section 8 (1) of the Act. In such cases, the provisions are consistently enforced. See cases collected in the Brief for the National Labor Relations Board in Opposition in *Max Kaplan Bros.* v. *National Labor Relations Board*, No. 690, October Term, 1943, pp. 10–11. In *Singer Mfg. Co.* v. *National Labor Relations Board*, 119 F. (2d) 131, 139–140 (C. C. A. 7), upon

which petitioner particularly relies (Br. 23–25), the Board regarded the employer's unilateral grant of a wage increase solely as evidence of his lack of good faith in bargaining with the Union and did not find that by this conduct the employer had directly violated Section 8 (1) of the Act (24 N. L. R. B. 444). That it was the absence of any such finding which impelled the court to modify the broad order in that case is evident from the subsequent decision of the same circuit court of appeals in *National Labor Relations Board* v. *Sunbeam Electric Mfg. Co.*, 133 F. (2d) 856, 862. The court there said:

> Although a specific violation may be one of the reasons for finding a more general violation, it does not follow that for every specific violation there may be an order covering all general violations. For instance, all failures to bargain are interferences, but all interferences are not failures to bargain. An employer, for failure to bargain, could not be ordered to cease and desist from all other imaginable interference, intimidation or coercion, in the absence of a finding that the failure to bargain was under the circumstances also a violation of Section 8 (1).
>
> In the case at bar, the employer was not found guilty of a specific offense which might be an element of a general, more comprehensive offense; it was found guilty of the general, more comprehensive offense,

> and the order may be as broad as the offense. If a refusal to bargain is interference, then to order one to cease and desist from that act stops the only kind of interference the employer was guilty of. But where the employer is found guilty of interfering, intimidating and coercing, it may be required not only to cease and desist from doing the number of things found, but also from all manner of like things.

Both the Circuit Courts of Appeals for the Ninth and Third Circuits, after their decisions in *National Labor Relations Board* v. *Mason Mfg. Co.*, 126 F. (2d) 810 (C. C. A. 9), and *National Labor Relations Board* v. *Newark Morning Ledger Co.*, 120 F. (2d) 262 (C. C. A. 3), with which petitioner asserts a conflict (Br. 22), have enforced Board orders of this type based on findings similar to those in the instant case.[12] *National Labor Relations Board* v. *Montgomery Ward & Co.*, 133 F. (2d) 676 (C. C. A. 9); *National Labor Relations Board* v. *Lebanon News Publishing Co.*, 129 F.

---

[12] Both cases, moreover, are distinguishable from the instant case. In the *Newark Morning Ledger* case, like the *Singer* case, *supra*, the Board made no finding that petitioner had directly violated Section 8 (1), but found only a derivative violation of that section based on the violation of Section 8 (3). In the *Mason* case, the court believed that the employer's violation of the Act stemmed from "an honest confusion as to his obligations to his employees" and found therein no "general intent to violate the National Labor Relations Act" (126 F. (2d) 810, 814).

(2d) 325 (C. C. A. 3), enforcing 37 N. L. R. B. 649, 661.

3. Petitioner's attack upon the Board's unit finding (Br. 35–42) presents no question which warrants review by this Court. The courts have uniformly upheld the Board's use of the "extent of organization" principle. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 132–135; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. (2d) 876 (C. C. A. 3), certiorari denied, 319 U. S. 751; *National Labor Relations Board* v. *Lettie Lee, Inc.*, 140 F. (2d) 243 (C. C. A. 9).[13] The propriety of its application where, as here, the evidence shows (*supra*, pp. 4–6) that the employee group which has expressed a desire to be represented in a separate unit is functionally homogenous is scarcely open to question.

If the Board had dismissed the Union's petition for certification, a group of employees seeking to bargain collectively would have been denied the opportunity of utilizing the machinery of the Act for the solution of their problems until such indefinite time in the future as the employees of the

[13] National Labor Relations Board, *Third Annual Report* (1939), pp. 157–158; *Fourth Annual Report* (1940), pp. 83–84; *Sixth Annal Report* (1942), p. 63; *Matter of Swift & Co.*, 42 N. L. R. B. 1184; *Matter of Pacific Gas & Electric Co.*, 44 N. L. R. B. 665; *Matter of Gardner-Richardson Co.*, 52 N. L. R. B. 1260; *Matter of Richmond Greyhound Lines, Inc.*, 52 N. L. R. B. 1532.

entire store should become organized."[14] Petitioner offers no justification for so unjust a result. Surely an asserted inconvenience in bargaining with such a unit is no justification, for as was pointed out in *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. (2d) 876 (C. C. A. 3), certiorari denied, 319 U. S. 751, in sustaining the Board's unit determination based upon extent of organization, the employer in such a situation does "not consider it impractical to bargain with every single employee separately." Nor may the unit which application of this principle creates be challenged solely because an industrial store-wide unit might eventually be more desirable. A bargaining unit is not rendered invalid merely because further organization and maturity of bargaining relations might make a larger unit more appropriate. The fact that the Union in this case accepts membership and is now seeking to organize on a store-wide basis does not require the Board to deny a small presently or-

[14] Only a few months prior to the instant proceeding the Board in *Matter of May Department Stores*, 46 N. L. R. B. 305, dismissed a petition for investigation of representatives on the ground that no labor union organizing employees in the Famous-Barr store and involved in that proceeding had made a substantial showing of representation of employees in a store-wide unit. The propriety of a craft unit was, of course, not in issue and under such circumstances, the Board's determination that an industrial unit would be appropriate does not, of course, foreclose its findings that a craft unit is also appropriate.

ganized craft group access to the Act's election machinery, nor does the Board's present action foreclose it in the future from reshaping the bargaining unit upon a broader basis.[15] While in some situations the Board lends approval to store-wide units in department-store cases, it frequently holds a craft or related unit appropriate.[16] The diversity in the scope of bargaining units approved by the Board in this field reflects the fact that workers in department stores are just beginning to organize and bargaining patterns have not yet crystallized.

---

[15] Petitioner's fears (Br. 36–37, 41–42) that the operations of its store may be disturbed by a long series of elections each conducted on a craft basis are wholly speculative. In applying the "extent of organization" principle the Board frequently points out, as it did here (R. 1, 13), that changes in the status of self-organization among the employees, foreseeable because of a union's broad organizational efforts, would require a subsequent enlargement of the unit. See, for example, the following cases: *Matter of Knaust Brothers*, 36 N. L. R. B. 915; *Matter of Eves and Andresen*, 42 N. L. R. B. 1209; *Matter of Foster-Grant Co.*, 32 N. L. R. B. 486; *Matter of Crescent Dress Co.*, 29 N. L. R. B. 351. Conversely, the previous unsuccessful attempts of a union to organize on a broader basis than the unit for which it petitions are not fatal to such a petition. *Matter of Standard Overall Co.*, 53 N. L. R. B. 960.

[16] See, for example, *Matter of May Department Stores*, 39 N. L. R. B. 471; *Matter of J. L. Brandeis & Sons*, 47 N. L. R. B. 614, enforced 142 F. (2d) 977 (C. C. A. 8) 1, certiorari denied October 16, 1944, No. 385, this Term; *Matter of J. L. Hudson Co.*, 49 N. L. R. B. 273; *Matter of Meier & Frank Co., Inc.*, 55 N. L. R. B. 101; *Matter of J. L. Hudson Co.*, 56 N. L. R. B., 406.

It is by no means clear that petitioner's insistence upon including in the unit employees in the women's alteration department and in the fur work room who were excluded by the Board is attributable to a desire to preserve for such employees "the full benefit of their right to self-organization and to collective bargaining" (Section 9 (b) of the Act).[17] And it is temerarious to suggest, as does petitioner, that no rational basis exists to support a simple craft unit of bushelmen—one of the oldest organized crafts in the United States.[18]

4. Petitioner's further challenge of the certification (Br. 31–35), on the ground that the Board considered the authorization cards submitted by the Union as sufficient evidence of the employees'

[17] *In Matter of J. L. Brandeis & Sons*, 47 N. L. R. B. 614, enforced, 142 F. (2d) 977 (C. C. A. 8), certiorari denied, October 16, 1944, No. 385, this Term upon which petitioner relies to show that the Board's exclusion of the two named groups of employees in this case was capricious (Br. 40), the Board held that such employees could appropriately be grouped together with bushelmen when the employees themselves had expressed a desire for such grouping. The case does not stand for the proposition that in the absence of such an expressed desire the groups may not appropriately be separated. And *Matter of May Department Stores*, 39 N. L. R. B. 471, upon which petitioner also relies (Br. 40–41), did not involve the question whether a unit of alteration workers would be appropriate if it failed to include those who work on women's clothing.

[18] See, Zaretz, C. E., *The Amalgamated Clothing Workers of America* (New York, 1924), pp. 54–68; Seidman, J., *The Needle Trades* (New York, 1941), pp. 70–84.

interest to warrant the Board in conducting an election, likewise presents no question warranting review by this Court. Petitioner's arguments in this connection were rejected by the court below after full consideration (R. 4, 10–11). The question is not of general importance in the administration of the Act, and no conflict of decisions is shown.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

ALVIN J. ROCKWELL,
General Counsel,
RUTH WEYAND,
MOZART G. RATNER,
Attorneys,
National Labor Relations Board.

MARCH 1945.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449; 29 U. S. C., Sec. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right

at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to

adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

U. S. GOVERNMENT PRINTING OFFICE: 1948